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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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The arguments in respondents' briefs in opposition to our petition and to the petitions in Nos. 80-1938 and 80-1939 give added weight to our contention that the decision of the court of appeals raises substantial questions concerning the proper construction of the Natural Gas Act. Those questions warrant this Court's review.

1. Respondents concede, as they must, that Transco filed increased rates with the Commission, but they contend that, because the company did not propose to change its existing rate differentials between sales zones, the Commission could not consider those differentials under Section 4 of the Natural Gas Act. Respondents, however, fail to focus on the precise language of Section 4(e) of the Act, 15 U.S.C. 717c(e), which sets forth the burden of proof requirements

in connection with a gas company's proposal for increased rates: "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

Contrary to respondents' suggestions (N.Y. Pub. Serv. Comm'n Br. in Opp. 9; Customer Br. in Opp. 12-13), the statute does not limit the company's burden to proving only the reasonableness of its "increases" in charges; the language plainly encompasses the entirety of the "increased rate." Thus, under the statute, each component of that new rate must be justified by the pipeline sponsoring it. Moreover, the statute draws no distinction between "changed" versus "unchanged" elements of the new rate; nor does it distinguish between increases in costs, on the one hand, and the pricing structure used to recover those costs from the company's customers, on the other. In short, the procedures provided in Section 4 of the Act govern the "newly changed rate" as set forth in the company's new rate filing.[1]

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[1]The purpose of the proceeding under Section 4(e) is to determine whether the new rate is just and reasonable. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 340-341 (1956). Contrary to respondents' views (N.Y. Pub. Serv. Comm'n Br. in Opp. 12-13; Customer Br. in Opp. 8-9), the Court in *Mobile* did not hold that in a Section 4(e) proceeding the Commission has jurisdiction only over changes that the company has proposed to make to an existing rate structure. Instead, as we noted in our petition (at 12-13), *Mobile* holds that the Natural Gas Act does not authorize a pipeline to make unilateral contract changes. See *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

Customer respondents assert (Br. in Opp. 12) that "the Commission has consistently applied § 5, not § 4" of the Act in cases involving proposals to change a pipeline's existing rate structure or allocation practices. All but one of the cases relied on for that proposition, however, relate to the manner in which the Commission has treated United Gas Pipe Line's purchased gas costs. Given the narrow focus of those cases, which concern a single pipeline's tariff's purchased gas

2. Respondents ignore the serious impact of the court of appeals' decision on the Commission's authority to order refunds of the portion of an increased rate later found unlawful.[2] The court below held that the Commission could not proceed under Section 4 to modify any element of an increased rate unless the modifications "represent at least partial approval of the change for which the enterprise had petitioned in its filing" (Pet. App. 33a). Under that holding, only those portions of the increased rate that stem from "changes" proposed by the company may be reached under Section 4(e). That section provides that the Commission may "order [the] natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." The decision below thus renders the Commission powerless to order a refund of any excessive charge, no matter how significant an element of the increased rate, unless that particular element reflected an actual "change" proposed by the company. This result undercuts the statute's essential purpose, which is to protect consumers from excessive rates. See *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 389-390 (1959).

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adjustment clause, they cannot be said to demonstrate the existence of the "consistent rule" that respondents urge upon the Court. Nor does the decision in *Michigan Wisconsin Pipe Line Co.*, 34 F.P.C. 621 (1965), aid respondents. There, the Commission simply determined that the proponents of a change from systemwide rates to zone rates on the pipeline had failed to support their proposal and that the record supported maintaining the status quo. In contrast, the cases cited in the petition (at 14 n.8), show that the Commission frequently orders changes in elements of increased rates under Section 4 without regard to whether such changes "represent at least partial approval of [a] change for which the enterprise had petitioned in its filing" (Pet. App. 33a).

[2]Indeed, respondent Long Island Lighting Company reaches the startling conclusion (Br. in Opp. 3) that, regardless of the provisions of the Act, "the Commission is probably better off without the power to implement changes in rate design retroactively." We submit that Congress, not the courts, has the responsibility of deciding, as a matter of policy, what powers the Commission should have.

3. Respondents' reliance (N.Y. Pub. Serv. Comm'n Br. in Opp. 15; Customer Br. in Opp. 9) on the "filed rate" doctrine as barring the Commission from exercising Section 4(e) authority over so-called "unchanged" elements is misplaced. When Transco's previous rate was in effect it was indeed the lawful, filed rate which the pipeline was authorized to collect and, like any other filed rate, it could not, pursuant to Section 5(a) of the Act, 15 U.S.C. 717d(a), be modified retroactively. See *Arkansas Louisiana Gas Co.* v. *Hall,* No. 78-1789 (July 2, 1981), slip op. 6. Once the pipeline placed its increased rate in effect, however, that new rate became the "filed rate" and the preexisting rate became a matter of history. In other words, the filed rate doctrine merely bars a pipeline, during the period in which a lawful, filed rate is in effect, from collecting charges other than those reflected in that rate. The doctrine accords no special status to components of past rates carried forward unchanged by the company when it adopts new, increased rates that are subject to scrutiny under Section 4(e) of the Act.

4. Respondent Customers contend (Br. in Opp. 16-17) that the court of appeals' decision may be upheld on the "independent" ground that the Commission's order prescribing a different method of cost allocation was not supported by substantial evidence. But the court's conclusion that the Commission failed to support its order by substantial evidence was based on the erroneous assumption that the Commission had the burden of justifying " 'any departure from a long standing practice' " (Pet. App. 17a, quoting from *Columbia Gas Transmission Corp.* v. *FERC,* 628 F. 2d 578, 586 n.31 (D.C. Cir. 1979)), even where, as here, the "long standing practice" was the product of settlements with respect to which the Commission expressly stated that it was not to be bound in future proceedings. Thus, if, as we

contend, the court of appeals erred in according precedential effect to the Commission's prior approval of settlements incorporating the historical cost allocation differentials, it follows that the court also erred in its analysis of the "substantial evidence" question.

For the reasons stated above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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